IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04.06.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.317 of 1993

1. Palaniammal
2. Veerakumar
3. A.Narayanasamy Gounder

... Appellants (Defendants 3 to 5)

Vs.

1. Sundarambal
2. Devathal
3 Palaniammal ... Respondents (Plaintiff and Defendants 1 and 2)

PRAYER: First Appeal filed under section 96 of CPC against the Judgment and decree passed by the learned Subordinate Judge, Tiruppur, dated 21.01.1993 and made in O.S.No.86 of 1987.

For Appellant : Mr.R.Gandhi, S.C. for
Mr.R.G.Harendhiran
For Respondents : Mr.R.Krishnan for
Mr.A.Sivaji for R1
Mr.G.Poonkundran for R2
R3 not served (No appearance)

J U D G M E N T

Defendants 3 to 5 in the Trial Court are the appellants. The first respondent herein filed the suit in O.S.No.86 of 1987 on the file of the Sub Court, Tiruppur for a partition and separate possession of one third share in Schedule A to D properties mentioned in the plaint and also for direction against defendants 3 to 5 to hand over possession of the said share to the plaintiff apart from mesne profits. The case of the plaintiff was that she is the elder sister of the first defendant. Both of them having born to their mother Palaniyammal the second defendant who has subsequently died, through, Chenniyappa Gounder. After the life time of their mother Chenniyappa Gounder has married the third defendant in the suit as his 2nd wife. The 4th defendant was born to Chenniyappa Gounder through his second wife Palaniyammal as their son. The 5th defendant is the purchaser of the D Schedule

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property from the third defendant.

2. It is the further case of the plaintiff that during the life time of the second defendant, the said Chenniyappa Gounder has lived with the third defendant and therefore, the fourth defendant who was born to the third defendant through Cheniyappa Gounder is illegitimate. Therefore, according to the plaintiff the first defendant and the second defendant their mother are alone entitled to the properties of Cheniyappa Gounder. According to the plaintiff, Chenniyappa Gounder died on 14.07.1984 intestate leaving behind his wife, the second defendant apart from the plaintiff and the first defendant as his daughters being his only legal heirs. Thereafter, it is the case of the plaintiff that the third defendant who was his legitimate wife of her father Cheniyappa Gounder has trespassed into the A to C Schedule properties and defendants 3 and 4 are in possession as trespassers.

3. It is also the case of the plaintiff that the third defendant has illegally sold away the D Schedule property in favour of his close relative and the said document is not valid and inasmuch as the plaintiff is not a party to the document and did not derive any benefit along with defendants 1 and 2, the sale effected in favour of the 5th defendant in respect of the D Schedule property is not valid in law. The possession of defendants 3 and 4 are only as that of trespassers in respect of Schedule A to C. The plaintiff also stated that to her knowledge her father has not executed any Will. In any event it is stated that the plaintiff reserves her right to file her detailed reply statement as and when any such documents are produced. In view of the same, the said suit for partition was filed by paying court fee under Section 37(2) of the Tamil Nadu Court Fees and Suit Valuation Act, 1955 claming that the plaintiff is in joint possession with defendants 1 and 2 with regard to A to D Schedule properties.

4. The 3rd defendant has filed the written statement. While admitting, that the second defendant is the mother of the plaintiff and first defendant, it is the case of the 3rd defendant that she was the second wife of the deceased Chenniyappa Gounder. It is also admitted that the suit properties belonged to Chenniyappa Gounder. But it is denied that Chenniyappa Gounder died intestate. It is the case of the 3rd defendant that it was she, who has given in marriage to the plaintiff and the first defendant. It is also her case that since second defendant was not having any male child, it was on her advice the third defendant was married and thereafter the second defendant has never lived with her husband Chenniyappa Gounder after some criminal case. It is also the case of the 3rd defendant that the plaintiff and the first defendant have also fallen out of their father and during the last date of Chenniyappa Gounder, it was only the third defendant, who was looking after

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him. It is also the case of the third defendant that the said Chenniyappa Gounder during his life time when he was hale and healthy, has executed a registered Will dated 07.08.1981 bequeathing the property in favour of the fourth defendant, who is the son of the third defendant and it was pursuant to the said Will the third and fourth defendants have been in possession. Since in the Will the Chenniyappa Gounder has not chosen to mention about the C Schedule property which he desired to give to the fourth defendant, if at all the plaintiff is entitled, she can only claim right under the C Schedule property along with the fourth defendant and the first defendant. Therefore, the third defendant denies that the plaintiff and the first defendant have any share in A and B Schedule properties. The first and the second defendants in the suit have remained ex-parte.

5. The Trial Court has framed the various issues including, as to whether the third and fourth defendants are the legal heirs of Chenniyappa Gounder, as to whether the Will executed by Chenniyappa Gounder on 07.08.1981 is valid in law and if so whether the fourth defendant is entitled for the A and B Schedule properties, as to whether the plaintiff was entitled for one third share apart from the issue as to whether the sale given to the fifth defendant in respect of D Scheduled property is binding on the plaintiff. There was another suit filed by the plaintiff in O.S.No.35 of 1988 claiming one fourth share from the 4th defendant, namely, Indian Bank, Tiruppur in respect of the amount pending and also for injunction against defendants 1 to 3. However, in the present appeal we are not concerned about the said second suit. Both the said suits were taken together and the plaintiff was examined as P.W.1 apart from the third defendant as D.W.1 and two other witnesses D.W.2 and D.W.3 on the defendant side after marking nine documents on the plaintiff's side as Ex.A.1 to A.9 and seven documents on the defendant side as Ex.B.1 to B.7.

6. The learned Trial Judge while considering that Cheniyappa Gounder married the third defendant during the lifetime of his legally married wife namely the second defendant and therefore, his marriage with the third defendant cannot be accepted as legitimate but has held that the son born to Cheniyappa Gounder through the third defendant, namely, the fourth defendant can be treated as a son and entitled for share from Cheniyappa Gounder's property, however, stating that he is not a legitimate son and therefore, held that the fourth defendant is not a legal heirs of Cheniyappa Gounder. While considering the validity of the Will executed by Cheniyappa Gounder dated 07.08.1981, which was marked as Ex.B.7 by giving the A and B Schedule properties in favour of the fourth defendant, the Trial Court has come to the conclusion that the said Ex.B.7 Will has not been proved by defendants 3 and 4 and therefore, held that the fourth defendant is not the owner of A and

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B Schedule properties. While deciding about the share to which the plaintiff was entitled, the Trial Court has come to the conclusion that the plaintiff, first defendant and the second defendant along with the fourth defendant are entitled for one fourth share each from Cheniyappa Gounder's property and in view of the same, the plaintiff was given one fourth share. Regarding the alienation made by third and fourth defendants in respect of D Schedule property to the fifth defendant the Trial Court has found that the third defendant has not proved that it was for the necessaries of the fourth defendant the sale was effected and therefore, the sale effected in favour of the fifth defendant, was held to be not valid. It is as against the said judgement and decree, defendants 3 to 5 have filed the above appeal.

7. Mr.R.Gandhi, learned Senior counsel appearing for the appellants would vehemently contend that when once the plaintiff has come forward with the specific case that defendants 3 and 4 are trespassers in respect of the Schedule mentioned properties and admitting specifically that the defendants 3 and 4 are in actual possession of Schedule A to C properties, paying court fee under Section 37(2) of the Court Fees Act, stating falsely as if she is in joint possession with defendants 1 and 2 is not correct. Unless the court fee is paid as per Section 37(1) of the Act, the plaintiff's suit cannot be sustained. The third respondent in the appeal who is the second defendant in the suit has not appeared through counsel. In any event, it is stated that she died and the first and second respondents who are the plaintiff and the first defendant respectively are her only legal heirs who are already on record.

8. On the other hand, as contended by the learned counsel for the first respondent, the court fee was never an issue raised by defendants 3 and 4 in the court below and therefore, the Trial Court did not frame it as an issue and there was no decision rendered in that regard also. In such circumstances, the power and jurisdiction of the Appellate Court in that regard is relevant to be considered. That is enshrined under Section 12(4) of the Tamil Nadu Court Fees and Suits Violation Act, 1955.

> "12(4)(a) Whenever a case comes up before a Court of Appeal, it shall be lawful for the Court, either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint or in any other proceeding in the lower Court and determine the proper fee payable thereon.
> Explanation:- A case shall be deemed to come before a Court of Appeal even if the appeal relates only to a part of the subject-matter of the suit.

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(b) If the Court of Appeal decides that the fee paid in the lower Court is not sufficient, the Court shall require the party liable to pay the deficit fee within such time as may be fixed by it.

(c) If the deficit fee is not paid within the time fixed and the default is in respect of a relief which has been dismissed by the lower Court and which the appeal seeks in appeal, the appeal shall be dismissed, but if the default is in respect of a relief which has been decreed by the lower court, the deficit fee shall be recoverable as if it were an arrear of land revenue.

(d) If the fee paid in the lower Court is in excess, the Court shall direct the refund of the excess to the party who is entitled to it."

9. A reading of the Section especially Section 12(4)(a) shows that only if an issue relating to the court fee was raised by the Lower Court and the Lower Court has considered and given a finding on that the correctness of Court Fee can be looked into or decided by the Appellate Court. A fair reading of the Section shows that there is no suo moto power on the Appellate Court to decide about the correctness of court fee. Since it is the correctness of the order passed by the Lower Court in respect of the court fee, which alone can be decided by the Appellate Court. This was the view taken by this Court in Rajammal and others Vs. Selvi and another by Mrs.Prabha Sridevan.J., in the judgement reported in 2001(3) MLJ 315. While construing the provision of Section 12(4)(a) of the Tamil Nadu Court Fee and Suits Valuation Act, 1955 it was held that the suo moto power of the Appellate Court, in deciding about the correctness of the court fee itself is possible only when the Lower Court has given a decision about the court fee and if the defendants have not raised any objections about the correctness about the court fee and no issue was framed, the Appellate Court cannot on its own motion, consider it's correctness. The relevant passage of the judgement as follows:

"5. The Court of appeal may, therefore, lawfully consider the correctness of the Court fee payable either on its motion or on the application of any of the parties only if any order has been passed by the lower court affecting the fee payable on the plaint or any other proceeding. We cannot ignore even one word in the Section so as to give a different meaning from what was intended. In this case, the defendants who are the appellants herein had not raised any objection regarding the correctness of the court fee. Therefore, no issue was framed in this regard by the trial Court and no decision was given regarding the

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valuation. While so, the Court of appeal cannot on its own motion, consider the correctness of the Court fee since there is no order passed by the lower Court affecting this question. In this case, there is no dispute that neither of the parties applied to the Court of appeal to consider this. Even if they had done, the Court of appeal can decide this issue only if the lower court had passed an order regarding the same. In the old Act, the accent appears to have been on the revenue and therefore, Sec.12(2) read thus:

> "But whenever any such suit comes before a Court of appeal reference or revision, if such Court consider that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of Sec.10, paragraph (ii) shall apply."

But the language of the Section as it stands now gives no room for any ambiguity."

Therefore, the issue regarding the correctness of the court fee as raised by the learned Senior Counsel for the appellant cannot be gone into by this Court at this stage.

10. In these circumstances, the judgement relied upon by the learned Senior Counsel for the appellant rendered in Kamaleshwar Kishore Singh Vs. Paras Nath Singh and others in 2002(1) SCC 304 is not applicable to the facts of the case for the reason that there, the Lower Court has given a finding regarding the court fee and it was in those circumstances, held that it is the reading of the plaint as a whole which must be taken into consideration for the purpose of payment of court fee irrespective of any objection raised by the defendants in the written statement.

11. In respect of the decision arrived by the Trial Court regarding Ex.B.7 Will executed by Cheniyappa Gounder in favour of the fourth defendant, it is the vehement contention of the learned Senior Counsel that while the attesting witnesses have been produced before the Courts who were examined as D.W.2 and D.W.3 who have spoken about the mental status of the testator at the time Ex.B.7 was executed and clearly in terms stated that they saw the testator signing and in his presence they have also signed as attesting witnesses and in such circumstances the Trial Court has held against the Will on technical ground that the attesting witness has stated that what was signed was in a stamp paper whereas it remains to be a white paper and therefore, rejected the evidence, especially in the circumstance that evidence was given by

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the attesting witnesses 11 years after they signed in the Will as a witnesses.

12. On the other hand, it is the contention of the learned counsel for the respondent that when 3rd and 4th defendants have placed reliance on the Will Ex.B.7, it is for them to prove that the Will has been executed in accordance with law and the same is genuine and according to the learned counsel, on appreciation of evidence when the court has come to a conclusion that the genuineness of the Will has not been proved, there is no necessity for this Court to interfere. On considering the above said facts and rival contentions and also referring to the judgement of the Trial Court as also the documents the point that arises for determination in this appeal is as to "whether the judgement of the Trial Court is correct in so far as it rejects the genuiness and proof of Ex.B.7 Will".

13. On pleading, it is clear that admittedly, the suit properties which are four in number, namely, A,B,C,&D were purchased by Cheniyappa Gounder. It is also admitted that Cheniyappa Gounder married the second defendant Palaniyammal and during the subsistence of the said marriage he married the third defendant who is also called Palaniyammal, and out of that relationship the 4th defendant was born. Likewise, it was through the first wife of Cheniyappa Gounder the plaintiff and first defendant were born and there were no other children. It is also now on admission that the second defendant died and the plaintiff and the first defendant are the her legal heirs. It is also not in dispute that Cheniyappa Gounder has executed a Will in Ex.B.7 dated 07.08.1981 and subsequently he also died. In this regard, it is relevant that the plaintiff in the plaint has originally stated that even though she was not aware of any other documents executed by Cheniyappa Gounder in favour of defendants 3 and 4, she reserved her rights to file a detailed reply statement on coming to know about any such documents. The wordings of the plaint in that regard are as follows:

> "Any how the plaintiff reserves her rights to file her detailed reply statement after appropriate time when any such make-fully documents are produced at a later stage."

14. It is in the written statement the 3rd defendant has clearly stated that in respect of A and B Schedule properties Chiniyappa Gounder during his lifetime has executed and registered a Will dated 07.08.1981 bequeathing the said properties in favour of the 4th defendant. The contents of the written statement are as follows:

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"8. In fact Senniappa Gounder during his life time and when he was hale and healthy and in good sense had executed a registered Will dated 07.08.1981 attested by respectable persons in favour of the 4th defendant bequeathing the properties mentioned in Schedule A and B of the suit properties."

15. It is also on record that the plaintiff who has stated in the plaint that after she come to know about any document stated to have been executed by Cheniyappa Gounder she would file a detailed reply statement, has not chosen to file any reply statement even after she was informed in the written statement about the Will executed by Cheniyappa Gounder on 07.08.1981. It is relevant to point out that the plaintiff while examining herself as P.W.1 in the chief examination has not even stated opposing such Will even though she has stated that her father was not in sound state of mind 6 years before his death. However, during cross examination of the 3rd defendant as D.W.1, a suggestion was put to her that the Will was procured for taking away the property. A reference to Ex.B.7 shows that it relates to two items of properties, which are A and B Schedule in the suit. In that Will which is registered, Cheniyappa Gounder has given the said two items of properties in favour of 4th defendant absolutely after his lifetime. The two attesting witnesses who have signed under Ex.B.7, namely, Avinasiyappan and S.Easwaran were examined on the side of the 3rd and 4th defendants as D.W.2 and D.W.3. D.W.2, who is one of the attesting witnesses while speaking about the Will executed by Cheniyappa Gounder in categoric terms deposed that he saw Cheniyappa Gounder signing the Will along with other witness Easwaran and there after they have signed and afterwards it was produced before the Registrar Office in which also they have signed as witnesses. The portion of the evidence of D.W.2 as follows:

"சென்னியப்பக் கவுண்டருக்கு சொத்துக்கள் இருந்தன. அவர் அவருடைய சொத்துக்களையும் 4ம் பிரதிவாதியின் பெயருக்கு உயில் எழுதி வைத்தார். நான் அந்த உயிலில் சாட்சி கையெழுத்து போட்டு இருக்கிறேன். உயிலை சென்னியப்பக் கவுண்டர் கையெழுத்திட்டதை நான் பார்த்தேன். ஈஸ்வரன் என்பவரும் அந்த உயிலில் சாட்சி கையெழுத்திட்டார். உயில் அவினாசியில் சார்பதிவாளர் அலுவலகத்தில் பத்திரம் எழுதும் இடத்தில் வைத்து எழுதப்பட்டது. உயிலுக்குண்டான வாசகங்கள் சென்னியப்பக் கவுண்டர் தான் கூறினார். உயிலை எழுதியவர் உயிலை படித்துக் காண்பித்தார். அதற்குப் பிறகு சென்னியப்ப கவுண்டர் கையெழுத்து போட்டார். சென்னியப்பக் கவுண்டர் கையெழுத்து போட்டதை நானும் ஈஸ்வரனும் பார்த்தோம். அதையடுத்து நான் முதலாவதாக சாட்சி கையெழுத்து போட்டேன்.

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அதையடுத்து ஈஸ்வரன் சாட்சி கையெழுத்து போட்டார். நாங்கள் கையெழுத்திட்டதை சென்னியப்பக் கவுண்டர் பார்த்தார். நாங்கள் சாட்சி கையெழுத்திட்ட பிறகு உயிலை எழுதியும் கையெழுத்திட்டார். அதற்குப் பிறகு உயிலை சார்பதிவாளர் அலுவலகத்தில் கொடுத்தார்கள். சார்பதிவாளர் அலுவலகத்திலும் நான் சாட்சி கையெழுத்திட்டேன். சார்பதிவாளர் முன்னிலையிலும் சென்னியப்பக் கவுண்டர் நான், ஈஸ்வரன் ஆகியோர் கையெழுத்திட்டோம்."

16. It is true that while cross examination he has stated that the evidence is given many years after his signature and therefore, he has forgotten the time when he reached the Registrar office, as follows:

"நாங்கள் திருப்பூர் வந்து போன சமயம் மாலை 4 மணி இருக்கும். நாளாகிவிட்டதால் எல்லாம் மறந்து போய்விட்டது. எத்தனை மணிக்கு வந்தோம் என்று ஞாபகம் இல்லை. உயில் எழுதிய தினம் அவினாசிக்கு போய் சேர்ந்த நேரமும் ஞாபகம் இல்லை. நாளாகிவிட்டது. உயில் எழுதிய சமயம் காலை 10 மணி இருக்கும்."

17. It is also true that D.W.2 has stated that a non-judicial stamp paper was purchased in the name of Cheniyappa Gounder but under which denomination it was purchased, was not known to him, which is as follows:

"சென்னியப்ப கவுண்டர் பெயருக்கு முத்திரைத் தாள் வாங்கப்பட்டது. எவ்வளவு ரூபாய்க்கு முத்திரைத்தாள் வாங்கப்பட்டது என்று தெரியாது."

In the further cross-examination he has stated that he was not aware as to whether it was a stamp paper or blank paper as follows:

"நான் கையெழுத்து போடுவதற்கு முன் சென்னியப்ப கவுண்டர் கையெழுத்து போட்டார். சார்பதிவாளர் முன்னிலையில் நான் கையெழுத்திட்டேன். அது முத்திரைத்தாளா வெற்றுத்தாளா என்று தெரியாது."

18. A reference to the entire evidence of D.W.2 show that the plaintiff who has chosen to state as P.W.1 even though without pleading since she has not filed any reply affidavit, that her father was mentally not well 6 years before his death, there is not even any whisper about the mental status of the father of the plaintiff while cross examining the attesting witness D.W.2 as well as D.W.3.

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19. Likewise, a reference to the next attesting witness Easwaran examined as D.W.3 also states clearly

> "எக்ஸிபிட்.பி7 ல் முதலில் சென்னியப்பக் கவுண்டர் கையெழுத்து போட்டார். அதை அடுத்து அவினாசியப்பனும் நானும் சாட்சிக் கையெழுத்திட்டோம். சென்னியப்பக் கவுண்டர் கையெழுத்திட்டதை நாங்களும், நான் கையெழுத்திட்டதை சென்னியப்பக் கவுண்டரும் படித்தோம். அதன் பிறகு பத்திரத்தை எழுதிய கிருஷ்ணமூர்த்தி கையெழுத்திட்டு அதற்குப் பிறகு பதிவு செய்ய எடுத்துச் சென்றோம். பதிவாளர் முன்னிலையில் நானும் அவினாசியப்பனும் சாட்சி கையெழுத்திட்டோம். சென்னியப்பக் கவுண்டரும் சார்பதிவாளர் முன் கையெழுத்திட்டார். சென்னியப்பக் கவுண்டர் இறப்பதற்கு முன்ப, எழுதி வைத்த உயில் இது."

In the cross examination he has stated

> "முத்திரைத்தாள் வாங்கி எழுதவில்லை. மொத்தம் எத்தனை பக்கங்கள் எழுதப்பட்டன என்று ஞாபகம் இல்லை. எழுதி முடிக்கும் போது காலை 11 மணி இருக்கும். முதலில் ஒன்று எழுதி பிறகு இரண்டாவது ஒன்று எழுதினார்கள். இரண்டாவது எழுதியதிலும் முத்திரைத்தாளில் எழுதவில்லை."

20. Even while cross examining the said D.W.3 there was absolutely no suggestion from the plaintiff's side that Cheniyappa Gounder was not in a sound state of mind at the time he has signed Ex.B.7. The legal aspect in respect of the requirement of Section 63(c) of Indian Succession Act, 1925 contemplates the manner in which the Will has to be attested, which is as follows:

> "63(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has been some other person sing the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

21. Likewise, the manner of proof of execution of the Will is enshrined under Section 68 of the Indian Evidence Act. A combined reading of both the legal provisions along with the evidence of D.W.2 and D.W.3 no doubt shows that Ex.B.7 Will has not only been

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executed in accordance with law and the same has been proved in the manner known to law. However, the learned Trial Judge while dealing with the said aspect of Ex.B.7 has chosen to take up the minor contradictions regarding the number of papers whether they are stamp paper or blank papers and time taken for the purpose of executing the said Ex.B.7 Will and taking serious note of a repetition of D.W.2 and D.W.3 stating that the they have seen the testators signing and after the testators signing the Ex.B.7 they have signed and after their signatures, testators signed in the Will, to disbelieve the versions of D.W.2 and D.W.3 and has come to the conclusion that defendants 3 and 4 have not proved that Cheniyappa Gounder has executed Ex.B.7 Will in a sound state of mind, which in my considered view is not only based on the improper appreciation of evidence of D.W.2 and D.W.3 but on the wrong application of legal provisions required for the purpose of proving the Will. In the absence of any pleading by the plaintiff contrary to the terms of written statement wherein the third defendant has specifically stated that Cheniyappa Gounder has executed a Will on 07.08.1981 and in the absence of any positive evidence or proof on the side of the plaintiff that Cheniyappa Gounder was mentally ill for six years before the date of his death, especially when it has been the case of the plaintiff as P.W.1 that she has always been taking care of her father, it is not known as to how the Trial Court has come to the conclusion as if the plaintiff has denied the signature of Cheniyappa Gounder under Ex.B.7.

22. In any event, the question of referring the signature of Cheniyappa Gounder under Ex.B.7 especially when it is a registered document with a necessary certificate issued by the registrar, to the handwriting experts does not arise. The learned Trial Judge has lost site of the assertions made by D.W.2 and D.W.3 that it is nearly 11 years after their signing as attesting witnesses under Ex.B.7, they were to given evidence before the court and in such circumstances mere technicalities cannot be taken into consideration to throw away the Will as not genuine, especially in the circumstance that the said attesting witnesses have clearly deposed the execution of the Will by Cheniyappa Gounder in the manner know to law as stated above. Even though normally this Court as a First Appellate Court will not interfere with the finding of the fact by the Trial Court, being a court of fact also this is a fit case wherein interference is warranted since the reasoning given by the learned Trial Judge in disbelieving D.W.2 and D.W.3 attesting witnesses on technicalities and thereby holding that Ex.B.7 Will has not been proved, is clearly based on not only improper reasoning but wrong findings which are against the provisions of law. Also taking into consideration, the conduct of the plaintiff having categorically stated in the plaint reserving her right to file a detailed reply statement and having failed to do the same and in addition not even suggesting to the attesting

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witnesses about the so called mental imbalance of her father for the past six years from the date of his death and without producing any positive evidence to that effects, there is absolutely no reason to disbelieve totally Ex.B.7 Will.

23. In view of the above said facts, the learned Trial Judge ought to have taken the overall view in accordance with law and in my considered view the decision is perverse and the technicality cannot stand in the way of rendering substantial justice.

24. It is while discussing about the essentiality about the Will the Supreme Court in the earliest of its judgement has laid down the law that when the evidence is satisfactory the Court would justify in making finding in favour the propounder. It was also held that the suspicious circumstance must be subject to the test of the satisfaction of judicial conscience and it is validly executed. The solemn question must be that it must be satisfied that the Will has been validly executed by the testator who is no longer alive and it is this element of solemnity which is stated to be the decisive factor. That was in (Venkatachala Iyengar Vs. B.N.Thimmajamma and others) reported in AIR 1959 SC 443, which runs as

> "However, there is one important feature which distinguishes will from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words the onus on the propounder can be taken to be discharged on proof of the

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essential facts just indicated."

25. In one of the latest judgements of the Hon'ble Supreme Court, while dealing with the effect of registration of the Will wherein the identifying witnesses have affixed their signature, it was held in 2005(8) SCC 67 that the executor signing before the Sub Registrar and endorsement made by him will amount to attestation in the following words:

> "23. A perusal of Ext.B.9 (in original) would show that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement were, in our opinion, sufficient attestation within the meaning of the Act. The endorsement by the Sub-Registrar that the executant has acknowledged before him execution did also amount to attestation. In the original document the executant's signature was taken by the Sub-Registrar. The signature and thumb impression of the identifying witnesses were also taken in the document. After all this, the Sub-Registrar signed the deed. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his Will or not and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and the testament of the departed testator.
>
> 24. In the instant case, the propounders were called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated above. It was argued by learned counsel for the respondent that the propounders themselves took a prominent part in the execution of the Will which confer on them substantial benefits. In the instant case, the propounders who were required to remove the said suspicion have let in clear and satisfactory evidence. In the instant case, there was unequivocal admission of the Will in the written statement filed by P.Srirammurthy. In his written statement, he has specifically averred that he had executed the Will and also described the appellants as his sons and Alla Kantamma as his wife

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as the admission was found in the pleadings. The case of the appellants cannot be thrown out. As already noticed, the first defendant has specifically pleaded that he had executed a Will in the year 1980 and such admissions cannot be easily brushed aside. However, the testator could not be examined as he was not alive at the time of trial. All the witnesses deposed that they had signed as identifying witnesses and that the testator was in sound disposition of mind. Thus, in our opinion, the appellants have discharged their burden and established that the will in question was executed by Srirammurthy and Ext.B.9 was his last Will. It is true that registration of the Will does not dispense with the need of proving, execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act. The Registrar has made the following particulars on Ext.B.9 which was admitted to registration, namely, the date, hour and place of presentation of the document for registration, the signature of the person admitting the execution of the Will and the signatures of the identifying witnesses. The document also contains the signatures of the attesting witnesses and the scribe. Such particulars are required to be endorsed by the Registrar along with his signature and date of document. A presumption by a reference to Section 114 of the Evidence Act, shall arise to the effect that particulars contained in the endorsement of registration were regularly and duly performed and are correctly recorded. In our opinion, the burden of proof to prove the Will has been duly and satisfactorily discharged by the appellants. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. In such circumstances, the onus shifts to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same."

In this case it is seen under Ex.B.7 that the same attesting witnesses have also signed as witnesses before the registrar who has duly certified on production of the said document. In view of the above said facts, I do not think that there is any suspicious circumstance in existence. It is also relevant to point out that even as per the judgement of the Trial Court even though the third

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defendant was held to be an illegitimate wife, the fourth defendant who was admittedly born through the third defendant through Cheniyappa Gounder, has been given one fourth share and therefore, it cannot be said that the fourth defendant was not a rightful heir and therefore, there is no suspicious circumstance in existence. In the absence of any suspicious circumstance in existence as it is seen on the over all facts and circumstance of the case, I do not think that the onus on the third defendant in proving the testamentary capacity of the testator was not discharged. As found by this Court in K.Jaganmohan Vs. D.Ruckmani and another in 2007(2) MLJ 466 by C.Nagappan,J. the ratio is clear, namely,

> "It is will settled in law that in the absence of suspicious circumstances surrounding the execution of the Will, it is sufficient for the propounder to discharge the onus by adducing proof of testamentary capacity and the proof of the signature of the testator as mandated by law. However, if there are suspicious circumstances, the propounder has to explain them to the satisfaction of the Court to discharge the onus, since the compliance of legal formalities as regards proof of the Will alone would not serve the purpose."

26. Further, mere exclusion of group of heirs will not itself make the Will invalid as it was held by this Court in D.Kausalya, wife of late Durai, Chennai-7 Vs. S.Shankaran reported 2002(1) CTC 650.

27. In view of the above said facts and circumstances, the finding by the Trial Court that the Ex.B.7 Will executed by Cheniyappa Gounder dated 07.08.1981 has not been proved, is not tenable and therefore, the judgement and decree of the court below in that regard is set aside.

28. As admitted by defendants 3 and 4 themselves Ex.B.7 Will has not included C Schedule property and therefore, there is no difficulty to come to the conclusion that the plaintiff is entitled for one fourth share in the C Schedule property as found by the Trial Court. In respect of D Schedule property admittedly it is also not forming part of Ex.B.7 Will. As correctly found by the learned Trial Judge, there is no evidence on record to show that the third defendant has sold the said D Schedule property in favour of the fifth defendant for any family necessaries of the fourth defendant and in view of the said facts the sale stated to have been effected in respect of D Schedule property by the third defendant in favour of the fifth defendant except it relates to the one fourth share of the fourth defendant will automatically be invalid and not binding upon the plaintiff.

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29. In view of the above said facts and circumstances, the appeals stands partly allowed holding that

1) In respect of A and B Schedule suit properties the fourth defendant will be entitled absolutely as per Ex.B.7 Will dated 07.08.1981 and the suit stands dismissed in that regard.

2) In respect of C and D Schedule suit properties the plaintiff will be entitled to the partition of 1/4th share and

3) It is open to the parties to move appropriate application under Order 20 Rule 12 of Code of Civil Procedure in respect of the said C&D Schedule properties.

Considering the facts and circumstances of the case the parties shall bear their respective costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nbj

To

1. The Subordinate Judge,
Tiruppur.

2. The Record Keeper
VR Section,
High Court, Madras

1 cc to Mr.R.G. Narendiran, Advocate, sr. 31678
1 cc to Mr.A. Sivaji, Advocate, Sr. 31667

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